

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1990

Strategic Research in Law and Society

Bryant G. Garth

Indiana University School of Law - Bloomington

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>



Part of the [Law and Politics Commons](#), [Law and Society Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Garth, Bryant G., "Strategic Research in Law and Society" (1990). *Articles by Maurer Faculty*. Paper 1003.
<http://www.repository.law.indiana.edu/facpub/1003>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

STRATEGIC RESEARCH IN LAW AND SOCIETY

BRYANT G. GARTH*

I. INTRODUCTION: RETHINKING RESEARCHERS' RESPONSIBILITY

IT IS difficult to construct a guide for law and society researchers seeking to find a stable solution to political, scholarly, and professional concerns. Certain favored theoretical positions, persistent doctrines, and polished academic denials of responsibility can be seen as responses by individual law and society researchers to the conflicting concerns they must confront. It is hard to avoid the positions that Professor David Trubek criticizes in his call for the rediscovery of a progressive tradition in law and society research. Yet I am quite sympathetic with his approach. I believe academics are responsible for the research they undertake. I also know there is a link between political views and academic interests and approaches.

To admit as much, however, is only to begin the discussion. For example, how should a researcher balance political, scholarly, and professional concerns? What kind of research has been, and will be, useful for law and society researchers? I will focus on what can be termed "strategic research," with the word "strategic" used simply to emphasize the researcher's self-consciousness and responsibility. My goal is to sketch a map for the law and society researcher and to insist on the importance of both studying and challenging the map's boundaries.

II. STRATEGIC RESEARCHERS

Imagine a politically sensitive and personally ambitious academic, not unlike many of those who find their way into the law and society community. The academic as researcher faces many complicated choices. Assume, for example, that this academic would like to work to abolish the death penalty and at the same time advance a professional career. Empirical research that follows what are conventionally believed to be the most refined scholarly analyses might serve these goals perfectly. The research could be so persuasive that it has the

* Director, American Bar Foundation; Professor of Law, on leave, Indiana University School of Law—Bloomington. The author thanks Shari Diamond for her perceptive comments on a draft of this Essay.

desired political impact on death penalty debates, while also winning the more technical peer respect that promotes a scholarly career. Thus, sophisticated social science could both build careers and solve social problems. Unfortunately, however, such a scenario is not all that common. Today, we find ourselves unsure whether professional and political interests can be harmonized so easily.

A. *Politics, Methods, and Careers*

The sensible academic will have to make some difficult choices. On the one hand, "poor" scholarly research that taps into a powerful political interest may help promote political change. Today's politics make this approach more available to conservatives than to liberals associated with the 1960's and the early days of the law and society movement. For example, a conservative who sets out to prove that legal aid hinders the poor could probably align with powerful interests and immediately be taken seriously. On the other hand, a scholar making a case for the views of a new public interest advocate will probably have a harder time. The work of this politically "out of touch" scholar will be scrutinized more carefully, and if not methodologically beyond reproach, may be dismissed as merely "political," meaning not within the political mainstream. Conversely, "non-political" really means not politically controversial. The scholar outside the political mainstream could opt for conducting a methodologically meticulous study thereby tempering or avoiding the political charge; however, the research may not be politically helpful. For example, such research might not show pervasive bias, exposure of which was once thought capable of overturning the death penalty.¹

B. *Core and Periphery*

The ambitious academic with law and society interests has another problem. It is not always enough in academia to be politically astute or methodologically above reproach. Not all topics and styles of research have equal status among the various academic elites. As an in-

1. The United States Supreme Court, in *McCleskey v. Kemp*, 481 U.S. 279 (1987), rejected statistical regression analysis as a method of proving the presence of racial bias in death penalty cases. In *McCleskey*, the Court ruled that statistics could not absolutely prove the Georgia death penalty was arbitrarily and capriciously applied more often to black people than to white people, thus violating the eighth amendment to the Constitution. *Id.* at 308-20. For more information on the statistical analysis presented in *McCleskey*, see Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 JOURNAL CRIM. L. & CRIMINOLOGY 661 (1983); see generally Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 1 (1980).

terdisciplinary professor of chemistry and geology noted, "[s]omething in the psychology and the sociology of intellectuals makes each of us yearn to make contributions to the 'core' of our disciplines. As a result, the closer one gets to the central topics in the classical disciplines, the greater the depth and strength of the research edifice."²

Law schools have their own structural reasons to push research toward the core; the most valued contributions on the academic side of the legal profession are those which contribute to the legal "language of power," that more or less formal language that holds the legal profession together.³ Thus, Bruce Ackerman appropriately takes on the challenge to create a "new language of power" that "powerholders will find persuasive."⁴ Such a language, he insists, will help prevent "the fall of the American legal mind from the heights of power."⁵

Much of the best law and society research falls outside the prevailing language of power. For example, studies of the social role of small urban courts do not arm lawyers with marketable "arguments."⁶ The core of the legal discipline, especially apparent at the most elite law schools and their imitators, remains the construction and reconstruction of legal arguments. Law and economics research seems to be a counter example. In reality, however, it tends to prove the point: law and economics represents the one example of a social science that has successfully found a place at the core of the legal arguments made in courts, administrative agencies, and other legal settings.

A scorecard can identify some of the inhabitants of the law and society community. One solid player is the objective social scientist, who denies that politics play any role at all in research. While it is doubtful that anyone denies the impact of political biases on the selection of research topics, one can emphasize the non-political nature of research. Objective social scientists will have their work noted and respected, but they may have to sacrifice or camouflage any political aims they might have. They also are very scarce individuals in the *law school* community, where pure social science seems to have no place.

There are other players with interdisciplinary interests, who may forget social science and concentrate on the core of law, perhaps even

2. INDIANA UNIVERSITY'S REPORT OF THE PRESIDENT'S INTERDISCIPLINARY ACTIVITIES COMMITTEE 5 (Nov. 27, 1985) (quoting Professor John M. Hayes, Indiana University).

3. Dezalay, *From Mediation to Pure Law: Practice and Scholarly Representation Within the Legal Sphere*, 14 INT'L J. SOC. L. 89 (1986).

4. B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 3 (1984).

5. *Id.* at 109.

6. For an example of an excellent empirical study of such a court, see Yngvesson, *Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town*, 22 LAW & SOC'Y REV. 409 (1988).

bringing non-law disciplines to the core. Law and economics has already been mentioned. Also notable is the work that scholars such as John Hart Ely and Ronald Dworkin have done with constitutional law and legal analysis.⁷ Such brilliant contributions can circumvent politics and build great careers. In fact, if sufficiently connected to the core, brilliant contributions and strong careers can be made even with politically-charged messages. For example, critical legal studies, in contrast to most empirical research, has the career advantage that comes from close attention to legal texts and legal reasoning.

The vitality of the law and society idea requires successful careers. Successful strategic research depends on researchers having their messages taken seriously. Both successful careers and successful research tend to be favored by contributions to whatever is perceived as the core of law. Researchers in other disciplines confront their own problems of core and periphery. These factors must be considered seriously by self-conscious and responsible researchers, and the law and society community must confront these factors as both opportunities and pitfalls.

C. *Between Positivism and Positive Thinking*

Before suggesting some strategies, I must raise one more important, but complicating, factor. So far I have oversimplified the "messages" of social research. Those messages are not necessarily clear, including messages about what types of research will be politically successful or build great academic careers. First, as Professor Trubek shows, the simple positivistic model of social science as a neutral predictor of behavior⁸ no longer appears convincing. Without the assurance of such a model, we lose the pleasure of research that tells us if we do a particular thing, the results will improve our lives or the lives of others. Take, for example, alternative dispute resolution. Despite many studies, we are still not sure that creating a mediation system as a supplement to, or replacement for, litigation results in more attention being paid to the deeper problems of the disputants, thereby leaving the disputants better off than if they had gone to court. Similarly, we cannot say with certainty that by reforming class action suits or bolstering federal legal services programs, disadvantaged groups will gain greater access to courts and to better housing and schools. Ultimately, contextual factors determine whether such efforts achieve their desired ends.

7. See generally R. DWORIN, *LAW'S EMPIRE* (1986) (containing mostly insights from philosophy); J. ELY, *DEMOCRACY AND DISTRUST* (1980) (integrating political theory into doctrinal analysis).

8. Trubek, *Back to the Future: The Short Happy Life of the Law and Society Movement*, 18 FLA. ST. U.L. REV. 1, 33-34 (1990).

While we tend to reject such simple notions of cause and effect, we accept as an article of faith that we can "reimagine" and change social relationships, even when sophisticated research tells us that such changes cannot occur. We know, for example, the limitations of strategies that aim for social change through the assertion of legal rights by legal professionals. Nevertheless, we refuse to abandon some form of that strategy.⁹ Some of the best research helps us see that we should not necessarily take for granted that which is given. In other words, social relationships are the product of many particular practices and need not be maintained as "given." According to this perspective, transcendence will always be possible.

The problem of combining the two perspectives, however, is rather daunting. As socially responsible researchers, we want to know that our research can help point to directions for constructive change; we also doubt that any research can unequivocally show that a particular act will produce a desired result. Why bother to do empirical research that describes correlations meticulously, when we cannot really be sure *what* will follow particular actions? Why not sit in the office, criticize, and reinvent? Maybe somebody's clever invention will turn out to be the spark that produces some good.

We will not be better off by reinventing in ignorance, nor will empirical insights necessarily bring progress. We must try instead to gain those insights where we hope we can accomplish something. I support David Trubek's characterization of critical scholars as "street-smart actors looking for ways to beat [the system]."¹⁰ One task of research is to make us "street-smarter," in order to deploy our faith in transformative possibilities. As other scholars emphasize, the possibilities for change and the structural constraints against change are not so irreconcilable that a focus on both is impossible.¹¹ A way can be found between strict positivism and uninformed positive thinking.

III. STRATEGIC RESEARCH IN LAW AND SOCIETY

David Trubek distills some of our street-smarts—the product of at least twenty-five years of research—with a number of important ob-

9. See, e.g., *Constitutional Bicentennial Symposium: The "Rights Revolution,"* 1987 AM. B. FOUND. RES. J. 203 (various authors discuss how far courts should go in interpreting the Constitution in "making up" rights); Milner, *The Denigration of Rights and the Persistence of Rights Talk: A Cultural Portrait*, 14 LAW & SOC. INQUIRY 631 (1989) (discusses the importance of "rights" and the role rights play in legal society today).

10. Trubek, *supra* note 8, at 33.

11. See A. GIDDENS, *THE CONSTITUTION OF SOCIETY* (1984); see also Coombe, *Room for Manoeuvre: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 69 (1989) (critically reviews contributions to the critical legal studies movement by focusing on the issue of the relationship between structure and subjectivity).

servations: (1) There is doubt about "the independent power of law to reshape social arrangements";¹² (2) Law is multivocal—"the sovereign more often than not speaks with a forked tongue";¹³ (3) Law is "a series of fragments which are deployed through a wide range of localized processes or practices";¹⁴ (4) Law is ideology, "reinforcing widely-held notions of what is possible or imaginable";¹⁵ and (5) Law remains "a site for transformative action."¹⁶ Explicit in these findings is the street-smart faith: "law makes a difference," and "struggles in and about the law are worthwhile."¹⁷ Trubek also suggests that a "new public interest law"¹⁸ would be a desirable development and that favoring civil rights and challenges to patriarchy is important.

I would like to build on these observations and set out a way of looking at a research program that might respond to many of Trubek's concerns. How can law make a difference, how even can special attention to civil rights or public interest law make a difference, given findings about lack of independent power and forked legal tongues? Moreover, any useful perspective must relate closely to the problem of competing concerns of individual researchers.

A. *Law's Institutions as a Starting Point*

I suggest we begin by paying close attention to the practices and ideologies of legal institutions. I define "institution" as a more or less settled cluster of ideologies and practices.¹⁹ One question is which institutions we must study as our own? We could derive topics for study from some transformative social vision, but I suggest a somewhat narrower starting point. In our institutional roles as law professors, and persons involved with legal systems, we have the following traditional subjects for study: courts, judges, lawyers, legal academics, legal language, legal texts, and traditional legal values. This list can be multi-

12. Trubek, *supra* note 8, at 41.

13. *Id.* at 42.

14. *Id.* at 43.

15. *Id.*

16. *Id.* at 44.

17. *Id.*

18. *Id.* at 54.

19. I think such a definition is evident in Habermas' focus on the development of normative systems: "The rationality structures that find expression in world views, moral representations, and identity formations, that become practically effective in social movements and are finally embodied in institutional systems, thereby gain a strategically important position from a theoretical point of view." J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 98 (1979); see also *id.* at 125; Baynes, *Rational Reconstruction and Social Criticism: Habermas' Model of Interpretive Social Science*, 21 PHIL. F. 122, 134-37 (1989).

plied, but it is useful as a general outline. Each of these subjects can be deconstructed or discounted as unimportant. One could then redefine them as not really "legal" but, rather, subordinate to politics. To focus on the deconstruction, however, is to miss the main point. Each of these parts of our tradition is an institutional resource, one that can be investigated with respect to more or less defined boundaries. In many respects, this set of institutions constitutes our family.

These parts of the legal tradition have uncertain boundaries; each part can be understood only as an aspect of a legal ideology that itself is not completely stable. We know more or less what a court is, for example, but shifting ideologies blur those boundaries. Indeed, a court is more of an ideological construct than a given entity fitting into the traditional ideology. As we shall see, I think the boundaries of the traditional legal subjects should be one of the focal points for study.

B. Skeptical Affection

The next step rests, in part, on a faith akin to the faith in transformative possibilities. Each part of our tradition contains what I will *posit* to be progressive elements. This starting point is presumptuous, but there are good reasons for beginning here.

Many of us chose a legal career, either in law practice or in teaching, precisely because we liked the progressive elements that we found in this tradition. Much important socio-legal research seeks to explore those progressive elements, to "test" them, and to reexamine them. Likewise, important research characteristically reminds us that all of the positive elements in our legal tradition can be very nasty at times. Our own family members can misbehave, but we approach them by looking for positive qualities. One way to conceptualize a research project is to think of these components as resources which we might use for political and social innovation. Their worth, or power, depends on many contextual factors, including the ideological setting, which, in turn, shapes the definition and redefinition of the line between law and politics.

C. Examples: Professionalism, Markets, and Rights

One potential example of important socio-legal research concerns legal professionalism. The first task is to clarify the values in professionalism. We have recently had some very good writing that does just that. Robert Gordon, David Luban, Deborah Rhode, and William Simon, for example, have improved the discussion significantly by find-

ing worthwhile and progressive values in legal professionalism.²⁰ But it is not enough to clarify values and argue what a good lawyer ought to be doing. One must also examine the market impact; specifically, one must find which market factors are putting pressure on professional values. We can point to deregulation, competition between lawyers, and competition between other businesses and professions, but we do not understand well the connections these trends may have to professionalism. All that is clear is that the production of documents exhorting professional values has intensified. Certainly market pressures exist which clearly relate to changes in ideology.

If one gets into the law firms and looks around very carefully, I think one will find a change in the way many lawyers give legal advice.²¹ In the past the best lawyer was one who could say "no" with integrity. Today, however, lawyers who say "no" may be a declining species. Many lawyers today complain that they must say "yes" or lose business. My guess is that different law firms are offering different products and sometimes competing for different markets. Empirical research can focus on these kinds of details in law firms, including the significance of client competition, and on what effect market factors have on pro bono activity and professional values. For example, we cannot say for sure that pro bono activity must decline, given the pressures of the market, but we can get a feel for what is likely to occur in the real world. Does it require "heroism" to undertake significant pro bono activity, or are there institutional places that can sustain the non-heroes? When is pro bono defined by the clients' world? We can learn how different law firm settings promote different cultures for particular professional values and how the various settings sell in the marketplace. This kind of information will make the writers on professionalism—and all of us—much more street-smart about the place of progressive professionalism.

A second example of interesting socio-legal research is research that clarifies the values in civil rights. Some good recent literature clarifying those values incorporates analyses of legal rights in discussions of key issues, thereby seeking to rethink what "rights" are and what the

20. See generally Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1 (1988) (discusses what lawyers have historically meant by "professional independence"); Luban, *The Noble Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717 (1988) (discusses the opportunities and moral possibilities of legal practice); Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274 (1986) (discusses the necessity of reform in the legal profession); Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (argues that lawyers should use discretion and seek to "do justice" in dealing with their clients).

21. See, e.g., Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 IND. L.J. 433 (1989) (discusses the effect large law firms have on legal education).

possibilities are for workers in the civil rights tradition.²² There is a power in conventional understandings of civil rights, and the machinery of the legal profession typically reinforces that power. Rights can be limiting constructs, of course, but their progressive power must not be ignored. The Bork controversy, for example, may have come out differently had he not seemed to reject a "right of privacy." That rejection, in part, allowed the legal profession to have a "professional," as opposed to merely "political," impact. It was quite interesting, even instructive, to observe the debates about exactly what the professional role of the American Bar Association's Committee on the Federal Judiciary should be in examining judicial qualifications.²³

The notion of "human rights," combined with a professional inclination of lawyers to promote good professional causes, often helps put lawyers in politically progressive situations. For example, professional organizations and their allies have been at the center of the public interest law movement, the international human rights movement, and movements to provide legal services for the disadvantaged. I have suggested that law schools produce a certain number of do-gooders who are then channelled into job opportunities and positions given respectability by prevailing professional ideology.²⁴ In several areas the combination of professional ideology and social context has significantly narrowed and redefined the opportunities available to such do-gooders. Again, a shifting law/politics line in political and professional rhetoric provides a key to understanding the situation. Have anti-poverty advocates in the United States gradually been transformed into human rights advocates against torture and apartheid elsewhere?

The two previous examples relate to the social change possibilities that might be charted and studied as part of law and society. Both illustrate the importance of studying not only behavior, but also social context and changing ideologies. Some features may be relatively stable. Our legal ideology generally provides a favorable setting for things called professional independence, pro bono work, and human rights, but these "things" can nevertheless appear rather different in different times and places.

IV. TESTING BOUNDARIES

The relationships among ideology and institutions and their boundaries, and social change and stability, point to the importance of clari-

22. See, e.g., Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987).

23. See generally, R. BORK, *THE TEMPTING OF AMERICA* 292-93 (1990).

24. Garth, *Transnational Legal Practice and Professional Ideology*, 7 ISSUES OF TRANSNATIONAL LEGAL PRACTICE 1985 MICH. Y.B. OF INT'L LEGAL STUD. 3, 19-20 (1985).

fying our own positions as academic researchers and teachers. We have institutional boundaries that protect us, such as those which allowed criticism of Robert Bork. Protection both provides shelter and confines us in certain structures. The boundaries applicable to the law and society community include social science conventions and the conventions of traditional legal ideology.

A. Case Studies and Legal Doctrine

We do not yet have much research to aid institutions involved in the law and society movement. For example, historians in other fields have traced the parts various institutions, ideologies, and personal ambitions have played in the development of scientific knowledge.²⁵ But in the legal field, we have no such studies. We can gain insight from the material available in case studies,²⁶ but the studies could be richer. I would like, for example, to understand the rise and fall of the right to welfare in the 1960's and 1970's. Could we trace such influences as pressures for tenure, the lure of political liberalism, the philosophy of John Rawls,²⁷ hierarchies of law reviews, and networks of clerks and lawyers, for example, in the development of particular rights and doctrines in the United States? Such studies of how a legal "discovery" is made would tell us about the boundaries and connections between law, politics, and professions.

Strategic research must respect the importance of institutions and boundaries, even if such institutions and boundaries are pushed in directions that we think would be progressive. Being strategic, however, means having a sense of how our efforts will be applied given our institutional settings.

B. Legal Science and Social Science: Problems in the Law School Relationship

Our own power and prestige—our ability to have a real voice in public debates—depends in part on the public perception of whether we are grounding our arguments in law or grounding them in social science. As noted before,²⁸ we can push the boundaries of what is law

25. See Gould, *A Triumph of Historical Excavation*, N.Y. Times Rev. of Books, Feb. 27, 1986, at 9, col. 1. "I know from my own experience as a participant in major scientific debates that the explicit record of publication is utterly hopeless as a source of insight about shifts, forays, and resolutions." *Id.* at 14, col. 1.

26. One of the best is M. FAUX, *ROE V. WADE* (1988).

27. John Rawls is a leading theorist in the revival of the philosophical study of theories of justice.

28. See *supra* text accompanying note 1.

and what is social science, but the danger is that we could lose power if we do not have the institutional protections. Social science, however, still fits rather poorly within the law school domain. Thus, in considering our institutional bases and their potential, it may be useful to rethink the place of social scientists in the law schools. Part of our task might be to redefine the boundaries that set off the core of professional education and scholarship.

Whether we label the relationship of law and social science a marriage or not, the question is whether we can make the relationship a better one. Many continue to believe that simply adding a social scientist to a law school provides an external perspective—for example, sociology, economics, anthropology, or political science—that makes us all better law professors. This belief is simply not true. The external perspective cannot be agreed upon. First, there are too many perspectives. Second, law professors are not interested in using the social sciences as a way of discerning “the truth,” because they do not believe in “truth.” Law professors also are not interested in social science as a form of argument that pays because, except for law and economics, it really does not pay to master social science. Notions that adding social scientists is necessarily a plus, and that everyone needs social science, do not provide a firm basis to support social science in law schools. After all, law professors are smart and will choose to read only what interests them.

C. Rethinking Professional Responsibility: One Path Toward a New Role for Social Scientists in Professional Education

Perhaps we can find some better justifications which will make social scientists more successful in the law schools. One such justification builds on the need to be street-smart. Law students enjoy hearing practitioners who have war stories. Street-smart social scientists who get a sense of what the major institutional components of our legal tradition actually are doing in the practical world can be wonderful professors. They provide war stories in context with a critical sophistication that enriches legal education in many important ways. Students moving into a controversial and rapidly changing profession should appreciate the nature of the profession in order to get a better critical sense of the world they will be entering.

Finally, it may also be that being street-smarter matters more today within legal education than it has in the past. Teachers of professional responsibility, building on the recent writings in professional responsibility mentioned earlier,²⁹ are beginning to teach the students that pro-

29. See *supra* note 20.

fessionalism as a lawyer means that they are, in fact, responsible for the clients they represent and the positions they take. No longer is it enough simply to blame the adversary system or to demur that one represents a client but does not take responsibility. This perspective receives more support in the current Model Rules of Professional Conduct³⁰ than in the earlier canons or codes. Once one makes *that* transformation, which admittedly is far from complete, it seems that the professional lawyers we train will *want* to be street-smart. They will want to know what it is they really are doing and what the social impact is likely to be. The rethinking of professionalism pushes the boundaries of what it means to be a professional, but that possibility does not appear unreasonable. If Professor Trubek's call for a new professional responsibility within the law and society community is taken seriously, the same analysis suggests that the legal profession also must reexamine its professional posture and practical impact.

30. MODEL RULES OF PROFESSIONAL CONDUCT (1989) (*Compare* MODEL RULES OF PROFESSIONAL CONDUCT, Preamble Scope and Terminology 5 *with* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble and Preliminary Statement 1 (1976)).